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Supreme Court, U.S.
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No. 09-347

In The

Supreme Court of the United States

GUARDIAN NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR, and THE ESTATE OF J.M., A MINOR

v.

AIG LIFE INSURANCE COMPANY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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QUESTION PRESENTED

Whether, absent an express discretion clause in an ERISA governed insurance plan, the factual determinations of the administrator are subject to *de novo* review by the courts.

PARTIES TO THE PROCEEDINGS

The parties below are included in the caption. They are:

Petitioner:	Nora Dutka as Guardian of the Estate of T.M., a minor, and the Estate of J.M., a minor
Respondent:	AIG Life Insurance Co.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nora Dutka is an individual who does not fall within the scope of Supreme Court Rule 29.6's disclosure statement.

TABLE OF CONTENTS

THE QUESTION PRESENTED.....1

PARTIES TO THE PRECEEDINGS.....2

CORPORATE DISCLOSURE.....2

TABLE OF AUTHORITIES.....5

PETITION FOR REHEARING.....7

GROUNDS FOR REHEARING

I. AIG improperly asserts, in its Response, that a discretion clause exists in this case.....9

II. AIG improperly asserts that the "preponderance of the evidence" supports their denial. Both lower courts indicated otherwise.....12

III. AIG has, throughout the case, and in its' Response, deliberately and systematically misquoted their own expert in order to turn a hypothetical statement into a usable fact.....14

IV. AIG continues to wave a bloody shirt for little more than prejudicial value 16

V. Other misapprehensions possibly caused by AIG's Response.....18

CONCLUSION.....20

CERTIFICATE OF COUNSEL.....23

TABLE OF AUTHORITIES

Dutka v. AIG Life Insurance Company, No.4:07-cv-04316 (S.D. Tex. July 14, 2008) 10, 11, 13, 14, 15, 16

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).....7. 22

Graham v. Met. Life, No. 09-60042 (5th Cir, October 22, 2009).....20

Holland v. International Paper Co. Retirement Plan. 576 F.3d 240 (5th Cir. 2009).....20

Met Life Ins. Co. v. Glenn, 128 S.Ct. 2343 (2008).....21

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Petitioner Nora Dutka's Petition For A Writ Of Certiorari

Respondent AIG's Brief in Opposition

PETITION FOR REHEARING

Please Reason, prevail.

Petitioner Nora Dutka (Ms. Dutka) asserts there are points of fact and law that have been misrepresented to this Court causing it to deny her a Writ of Certiorari.

The statements believed by Ms. Dutka to have misled this Court occurred in Respondent AIG's (AIG) Brief in Opposition. AIG made statements to this court that are inaccurate, incomplete, challenged and unproven, and/or irrelevant. There was insufficient time, prior to this Court's consideration of her petition, for Ms. Dutka to address these statements. There is insufficient space here to address them all.

As the many cases cited in Ms. Dutka's Petition show, where there is no express discretion clause in an ERISA covered insurance plan, every other circuit, citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), applies *de novo* review to plan term interpretations and to factual determinations of the administrator. Only the Fifth Circuit, in requiring no such discretion clause and instead applying

automatic deferential review (arbitrary and capricious) to an administrator's factual determinations, is in conflict with the other Circuit Courts. The existence of this conflict has not been disputed. The opinions of the lower courts here, however, show that this adherence to a deferential review standard likely led them to decide this case contrary to their own stated reservations about the evidence.

Due to the constraints of this Petition for Rehearing, complaints will be limited to AIG's Brief in Opposition. Ms. Dutka has necessarily included references to the Record of the District Court in order to substantiate her statements. These citations will include an underlined docket entry number in the District Court Record and are available on PACER or can be provided upon request.

Ms. Dutka, as Guardian of the Estates of T.M., a minor and J.M. a minor, respectfully asks this court to consider the grounds of this Petition, rehear, and grant her Petition of Writ of Certiorari.

GROUNDS FOR REHEARING

I. AIG improperly asserts that a valid discretion clause exists.

AIG's argument's regarding the existence or not of a discretion clause are irrelevant for purposes of this appeal. The existence of a discretion clause is not at issue before this Court. What is at issue is whether, absent a discretion clause in an ERISA covered plan, factual determinations of an insurance administrator are to be reviewed by the courts de novo.

AIG's Response is peppered throughout with assertions that the Petition should be denied because there is a discretion clause in a "plan document." The existence of a discretion clause has been challenged and briefed in the lower courts but never decided. Pet. App. 1-16. AIG has had more than ample time to establish that a discretion clause applies but never did. Ms. Dutka has been consistent in her arguments that no discretion clause applies. AIG's assertion of a contested, unresolved issue as if fact in support of an argument is conduct calculated to lead to an incorrect result.

On pages 9-13 of its' Response, AIG continues making arguments as though an actual discretion clause had been shown to apply. This is incorrect. AIG even goes so far in foot note 2 on page 12 of its' Response to assert that the actual policy was not in the record. The policy is in the Court's record though. Docket No. 30-31 (*the Policy*); Docket 34, (*Master Application for Group Accident Insurance*), *Dutka v. AIG Life Insurance Company*, (S.D. Tex. July 14, 2008) (No.4:07-cv-04316). Expressly, these documents "make up the entire agreement between the parties." Docket No. 31, p.4, *Dutka* (No.4:07-cv-04316) (*integration clause in the policy*).

The first documents sent to Ms. Dutka, upon her request, from AIG were the actual policy and the Master Application for Group Accident Insurance listed above. The policy had a clause integrating these documents and the attached riders. *Id.* None of these documents contained a discretion clause. Docket No. 30-31, 34, *Dutka* (No.4:07-cv-04316). The document AIG proffers as containing a discretion clause showed up a year and a half later, after Ms. Dutka's Summary Judgment motion in District Court. It had not been referred to up to that point and was not written by AIG or any other insurer nor did it have dates regarding

enactment or effectiveness. Docket No. 39, *Dutka* (No.4:07-cv-04316). In a hearing before the District Court, Dutka directly challenged its applicability and whether it even existed at the relevant time and AIG NEVER offered any evidence of either. Docket No. 60, p.2, *Dutka* (No.4:07-cv-04316). The court never ruled on the issue.

In its Reasons for Denying the Petition, AIG asserts that this case is not ripe for this court's consideration. Br. in Opp. 6-14. In one brush stroke, "here the plan documents expressly grant discretionary authority to AIG to determine whether Ms. Dutka is eligible for the benefits she seeks," AIG attempts to make a legal argument and support it with a demonstrably unproven statement regarding the existence of a discretion clause. Br. in Opp. 6.

Though offering no legal authority for the assertion, AIG also argues that in order to decide this case, this Court would have to decide whether a discretion clause exists at all. Br. in Opp. 11. This is completely wrong. It is backward. This Court is simply being asked to determine if a discretion clause is required for a court to apply a deferential standard of review to factual determinations. Ms. Dutka did not ask this Court to decide if

a discretion clause exists. It is not an issue on appeal. The existence of a discretion clause would be a determination for the District court upon remand just as it is in an original proceeding.

Ms. Dutka's claim denial was affirmed precisely because the court gave deference to an administrator's determination *regardless* of the existence or not of a discretion clause. Pet. App. 3, 4, 13. Therefore, this case is precisely ripe for this court's consideration on the very narrow question presented.

II. AIG improperly asserts that the preponderance of the evidence supports the denial. The Fifth Circuit and the District Court indicate otherwise.

In addition to improperly arguing the existence of a discretion clause, AIG has made their Brief in Opposition little more than an attempt to retry the facts. The facts have not been appealed. AIG blatantly proffers that the "preponderance of the evidence" would cause the same result regardless of the standard of review applied. Br. in Opp. 13. But the lower courts indicated that the evidence offered by AIG, in fact, did not rise to the level of preponderance of the evidence. Pet. App. 4-5, 16. "We agree

with the district that there was no direct proof that the drugs caused this crash... Pet. App 6. But, in applying an arbitrary and capricious standard, the court affirmed the denial. *Id.*

It is disingenuous of AIG to assert that the court made any determination based on the veracity or weight of the evidence it offered. In its' Response, AIG quotes the district court judge as writing "the record in this case admits of no other decision." Br. in Opp. p.7. The lower courts made a decision based on Circuit case law granting deferential review regardless of a discretion clause in the policy. Pet. App. 3, 7(fn4), 13. The very reason Ms. Dutka has persevered in her claim is precisely because she asserts the case would not come out the same under *de novo* review. She finds support for her assertions in the lower courts opinions where they courts take pains to note they are making their ruling in spite of insufficiencies in the evidence. Pet. App 4, 5, 6, 15.

III. AIG has, throughout the case, and in its' Response, deliberately and systematically misquoted their own expert in order to turn a hypothetical statement into a usable fact.

Much of AIG's argument has rested on the statement of its' expert, a Ph.D. in toxicology. However, in its' Response, AIG manages to continue the case-long misquoting of their expert. They did so with such abandon in the lower court pleadings that the taint extends to the actual opinions of the lower courts. Their expert, Gary Lage, PhD, was indeed a paid master at derogatory prose, but he never said that he believed Mr. Macsai was under the influence at the time of the accident and he never said that he believed that drugs caused this accident. Docket No. 28, 32, 33, *Dutka* (No.4:07-cv-04316). This is what the policy exclusions AIG used to deny the claim require. Docket No. 31, p.2, *Dutka* (No.4:07-cv-04316). AIG constantly took Lage's hypothetical statements and edited them to accomplish its points.

AIG's expert threw in much prejudicial material but never said that he believed the decedent was under the influence or that it caused the accident. Docket No. 28, 32, 33, *Dutka* (No.4:07-cv-04316). That statement arose from AIG's leaving out the 'if' in their expert's statements, turning a hypothetical into an assertable fact. See Br. in Opp. p. 14,

but compare, Docket No. 33, p.2, *Dutka* (No.4:07-cv-04316). AIG's expert is quoted as concluding that ingestion of cocaine and Propoxyphene would have impaired [Decedent's] ability to operate an aircraft. Br. in Opp. 14. But AIG deliberately excludes the words that Lage uses to qualify that statement "[i]f (the decedent) had been naïve to the effects of Propoxyphene (Darvon, ed.) and/or if cocaine was actually present in his blood at the time of the accident..." Docket No. 33, p.2, *Dutka* (No.4:07-cv-04316)[1]. AIG intentionally left out the qualifying "if"s when they quoted Lage even though Lage himself was very careful in his statements.

The District was clear when it said [t]here is no proof that the drugs in the decedent's system (sic) were a cause of the fatal crash..." Pet. App 15. AIG argues that Petitioner did not controvert their expert. Ms. Dutka did indeed challenge AIG's expert prior to the law suit with statements from the very learned treatises cited by him. Docket No. 22, *Dutka* (No.4:07-cv-04316). AIG itself put these statements into the record. Docket No. 39, p. 37, *Dutka* (No.4:07-cv-04316).

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[1] Gary Lage, Ph.D. in his last of three statements, two of which were in response to Ms. Dutka's challenges.

Another example of AIG's creative editing is where they failed to correctly quote the Fifth Circuit where it wrote that Propoxyphene, "might have had effects more severe in someone who did not regularly take the medicine..." Pet. App. 12. Instead AIG wrote, citing to the above quote, "Dr. Lage concluded, again without contradiction, that the ingestion of cocaine and Propoxyphene would have impaired [decedent's] ability to operate the aircraft. *Id.* at 12." Br. in Opp. 14. AIG literally replaced "might" with "would." *Id.*

AIG apparently took no warning from the Fifth Circuit regarding the jumps in logic in AIG's pleadings. Pet. App. 5.

IV. Rather than address the legal arguments in Ms. Dutka's Petition, AIG, in it's Response, continues to exploit prejudicial terms.

Cocaine, pilot error, Toxicology report, Propoxyphene. These very words reproduced hundreds of times are incredibly prejudicial to anyone with normal sensibilities. Cocaine? None was detected in the blood of the decedent. Docket No. 27, *Dutka* (No.4:07-cv-04316). Pilot error? The District Court took

AIG's wording, but no official report ever used the lexiconic term "pilot error." Docket No. 35, 36, *Dutka* (No.4:07-cv-04316). Toxicology report? Never does any Official indicate that Mr. Macsai was under the influence nor does any Official ever state that they believed drugs a cause of this crash. Docket No. 24, 27, 35, 36, *Dutka* (No.4:07-cv-04316). AIG's own expert never said so either but was misquoted nearly every time he was quoted at all. (See Section III, this Petition for Rehearing). Propoxyphene? This is Darvon which is a mild analgesic narcotic and the decedent's blood contained an amount equal to half a normal, common dose. According to AIG's own expert, "that amount may not produce significant impairment in an individual tolerant to the medication, but would in someone not tolerant." Docket No. 33, p.2, *Dutka* (No.4:07-cv-04316).

These prejudicial words are bloody shirts. AIG has waved them so fervently, they have painted the entire room with falsehood. Br. in Opp. p. 2,3,4,5,6,7,13,14. Under an arbitrary and capricious standard of review as applied below, these prejudicial words carried the day. Under a *de novo* review, where the court would examine the veracity and weight of the evidence, Ms.

Dutka asserts they would no longer prevail. There is substantiation in the opinions of the lower courts for her assertion. Pet. App. 4, 5, 6, 15.

It is very telling that AIG has yet again filed a responsive pleading utilizing prejudice instead of sound legal arguments.

V. Other possible misimpressions caused by AIG's Response.

Ms. Dutka believes it possible that this Court understood, due to AIG's statement to the effect in its Brief in Opposition, that Ms. Dutka is asking the court for an advisory opinion. Br. in Opp. 1. This is incorrect. Ms. Dutka presented only one question, 27 words: "[w]hether, absent an express discretion clause in an ERISA governed insurance plan, the factual determinations of the administrator are subject to de novo review by the courts." This is as pointed and specific as possible. In every circuit but the Fifth, the answer would be a simple and clear "yes." *See* Pet. App. 7-18.

In the first sentence of its Brief in Opposition however, AIG states that we are asking "what standard of review courts must apply." This is a very, very different question

from the one actually posited by Ms. Dutka, requiring a completely different type of answer.

As to pages 10-13, they are nothing more than AIG taking one more bite at arguing as if a discretion clause had been proven to exist. These arguments should be disregarded in their entirety.

AIG would further have this Court believe that denying cert. is no big deal. Br. in Opp. 13. However, approximately 134 million Americans are covered by ERISA governed plans. *From the Colorado Dept. of Insurance website*: http://www.dora.state.co.us/INSURANCE/consumer/2009%20docs/consFaqERISA062209.pdf. The U.S. Census Bureau lists the population of the Fifth Circuit (Texas, Louisiana, and Mississippi) at over 10 percent of the United States population. *U.S. Census Bureau website*: http://factfinder.census.gov/home/saff/main.html?_lang=en. This case, therefore, presents the opportunity to affect the lives of over 13.4 million people by placing them on equal legal footing with the citizens of the other circuits. Even if, as AIG asserts (Br. in Opp. 13), only a small fraction are covered by plans with no

discretion clause, there are still potentially millions of people involved.

This case has drawn the attention of the Bar and the Courts of the Fifth Circuit such that it has already been cited three times, in Fifth Circuit opinions, just for the citations to prior case law within. [2]

If this Court's denial is allowed to stand, Ms. Dutka asserts that this case can also be accurately cited for the proposition that "all death determinations are strictly factual and thus reviewed under an arbitrary and capricious standard and we're not going to require discretion clauses or consider plan term interpretation arguments." This is indisputably and exactly what happened in this case. This is not only in conflict with every other Circuit Court, this directly contradicts what this Court said in *Bruch v. Firestone*. In 1989, this Court said, "a denial of benefits challenged under 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary

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[2] *Piecznski v. Dril-Quip, Inc. Long Term Disability Plan*, No. 09-20187 (U.S. Ct of App. 5th Circuit) November 23, 2009; *Graham v. Met. Life*, No. 09-60042 (U.S. Ct of App. 5th Circuit) October 22, 2009; *Holland v. International Paper Co. Retirement Plan*, 576 F.3d 240, 251 (5th Cir. 2009).

authority to determine eligibility for benefits or to construe terms of the plan." 489 U.S. 101, 115 (1989).

Finally, in her lower court pleading, Ms. Dutka argued that AIG's dual role as administrator and insurer created a conflict of interest which should have at least reduced the deference granted to the administrator. The District Court disregarded Ms. Dutka's arguments and made no allowances. Pet. App. 14. This Court, during the time of this case, later examined that very issue in another case and found that such an arrangement does indeed create a de facto conflict of interest. *Met. Life v. Glenn*, 128 S. Ct. 2343, 2351 (2008). That case also reaffirmed that absent an express discretion clause, review is *de novo*.

CONCLUSION

This case presents the Court with a ripe controversy involving a sole Circuit applying a law that conflicts with the other Circuit Courts. The result of that conflict is that Ms. Dutka has no chance at *de novo* judicial review of the facts of her case even though

she would in any other circuit in the United States.

Granting Ms. Dutka's petition, answering her question in the affirmative and remanding back to the District court is the proper decision. It would require the District Court to examine whether a discretion clause exists here. When, as Ms. Dutka asserts, one is not found to apply, the court would then be able to examine and rule on the weight and veracity of the evidence *de novo*. This squares with the law in the other circuits. *See* Pet. App. 7-18.

Before dismissing this Petition for Rehearing as the last gasp of a drowning Petitioner, this Court must recognize that Ms. Dutka's endurance and unwavering commitment to her position has allowed her to stay this course and present this Court with a ripe opportunity to remedy an egregious and destructive inconsistency between the Circuit Courts. And she has gone to great lengths to accurately and honestly plead her case. To let that be derailed by less worthy comportment would be the deepest cut of all.

Ms. Dutka prays this Court rehear her Petition for Writ of Certiorari and grant it.

Please reason, prevail.

Respectfully submitted,

/s/ J. Kevin Tarrant
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CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this Petition for Rehearing is presented in good faith, is limited to responses to arguments made in Respondent's Brief in Opposition, and is not offered for purposes of delay.

/s/ J. Kevin Tarrant
Counsel for Petitioner